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No. 596

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In The Supreme Court of The United States

OCTOBER TERM, 1967

HENRY BRULAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

No. ____

HENRY BRULAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Henry Brulay, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on August 9, 1967.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals of August 9, 1967, is not reported at this date but is set forth verbatim in Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Rule 22(2) Rules of the Supreme Court and Rule 37(c) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

May a Federal criminal conviction be predicated on evidence resulting from acts by Mexican officials, which acts violated the Fourth and Fifth Amendments to the Constitution and the interrogation safeguards specified by this Court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutiona' provisions involved are the Fourth Amendment to the Constitution, set out verbatim in Appendix B, and the Fifth Amendment to the Constitution, set out verbatim in Appendix C. The statutory provision involved is Title 18, U.S.C., §371, set out verbatim in Appendix D.

STATEMENT

Petitioner was charged in a single count indictment filed in the Southern District of California, with a violation of Title 18, U.S.C., §371. A copy of the indictment is set out verbatim in Appendix E. Reference hereafter to the Clerk's Transcript will be designated C.T., and to the Reporter's Transcript as R.T.

A special interrogatory was submitted to the jury. The only overt act which they found proved was one not committed in the United States and also not alleged in the indictment (C.T., p. 5; R.T., p. 339).

On Friday, January 28, 1966, petitioner was stopped in Tijuana by two officers of the Municipal Police Department because his car looked heavy (R.T., pp. 11-12). He was forthwith arrested and taken to the police station where the trunk was opened and 130 Kilograms of amphetamine tablets found (R.T., pp. 12, 17, 38). After the lapse of 12 or 13 hours, during which petitioner was interrogated, he eventually took the Mexican officers to a private home in Tijuana where an additional large quantity of tablets was seized (R.T., pp. 22, 23, 24). Although the Mexican officer effecting the arrest stated it was not pursuant to previous information (R.T., pp. 14, 16, 17) nevertheless, prior to the actual arrest the customs agency had, through the Federal Bureau of Narcotics, in fact contacted Mexican federal officers (R.T., pp. 27, 28, 208, 209). The apprehending officers in Tijuana had no warrant of arrest and no order for search (R.T., pp. 14, 15, 24). At the time of petitioner's arrest, possession or transportation of

amphetamine was not a violation of Mexican law (R. T., p. 34). A motion to suppress the use of this evidence was denied and the material received over objection (R. T., pp. 31, 265-270).

Testimony was received over objection concerning some of five separate interrogations of petitioner (R. T., pp. 39, 97, 103-110, 115). Secret Agent Farfan of the Mexican Municipal Police (R. T., p. 35), testified concerning a conversation he had with petitioner the day following the arrest and seizure of petitioner's person off the streets of Tijuana some 24 hours earlier (R. T., p. 39). At this time, petitioner purportedly told Farfan that his function was to pick the tablets up at the airport and deliver them to one Fierro (R. T., pp. 40-42).

At the time of this conversation, petitioner had been held in the commandant's office in Tijuana for over 24 hours and had been interrogated the preceding day and night from 9:00 o'clock in the morning until 11:00 o'clock at night (R. T., pp. 49, 61-65, 72-77). It is petitioner's position, which was rejected by the Court of Appeals, that this interrogation by Farfan was wholly inadmissible in a federal prosecution in the United States District Court and that Farfan's interrogation tainted and rendered inadmissible that questioning which occurred thereafter.

The next questioner, after Farfan, was Agent Moore of the customs service. This occurred on Sunday, the second day following petitioner's arrest (R. T., p. 107). At that time, petitioner was still in the commandant's office. None of Moore's questions touched on the treatment Brulay had received (R. T.,

pp. 112-115). It is significant that there was a Mexican officer present in the room at the time of Moore's questioning on the 30th (R. T., pp. 47, 114). It was only at this interrogation and the preceding one with Farfan that petitioner is claimed to have said anything which would permit an inference that he knew the tablets were destined for the United States (R. T., pp. 40-42, 108, 111). The third interrogation was conducted at the Tijuana jail on Wednesday, February 2, 1966 which was again by Agent Moore, accompanied by Gates of the customs service (R. T., pp. 103-105, 108-109). This interrogation was not in the presence of any Mexican officials and at this time, according to Moore, petitioner denied having previously stated he was aware the tablets were destined for Los Angeles (R. T., p. 109). The fourth interrogation took place shortly after petitioner entered the United States on February 3, 1966 (R. T., p. 37) and the fifth questioning was at the San Diego County Jail on February 5, 1966 (R. T., p. 102). The latter two interrogations are not of particular significance.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in the instant case deals with an important question, to-wit, the effect of misconduct by government officials in another and contiguous country on the admissibility of evidence produced thereby in a prosecution for alleged violation of laws of the United States. Furthermore, it is submitted that the decision of the Court of Appeals, although not directly in conflict with a decision of this Court, nevertheless does not accord with the principles applied by this Court in dealing with the admissibility

of seized evidence and testimony concerning statements made by a person held in custody.

It would be an understatement to observe that the treatment accorded petitioner wholly failed to meet that standard which would be required in this country concerning a citizen of Mexico. See: Bridges v. Wixon, 326 U.S. 135, at page 161 (1945). Furthermore, it has been unequivocally held that simply because citizens of the United States elect to leave its continental limits that they do not abandon the constitutional protections which are provided in dealing with officials of their own country. See: Reid v. Covert, 354 U.S. 1, at pages 5-7 (1957), and Best v. United States, 184 F.2d 131, at page 138 (1st Cir. 1959).

Petitioner now faces a sentence of five years in prison by reason of a conviction which is wholly predicated on evidence obtained after he had been snatched off the streets of Tijuana, and taken to a police station where his vehicle was searched, resulting in seizure of physical evidence. He was then interrogated for 12 or 13 hours until he took the Mexican officers to a private home where additional physical evidence was seized. The "clincher" so far as the government's case is concerned, was then provided by testimony concerning questioning by a Mexican Secret Service Agent almost 24 hours after the initial apprehension and while petitioner was still in the room to which he had been originally taken.

With respect to the real evidence admitted against petitioner, it is submitted that receipt of the same in a Federal criminal prosecution is wholly repugnant to the

rationale of this Court as expressed in Elkins v. United States, 364 U.S. 206 (1960) wherein it was noted:

> "These, then, are the considerations of reason and experience which point to the rejection of a doctrine that would freely admit in a federal criminal trial evidence seized by state agents in violation of the defendant's constitutional rights. But there is another consideration - the imperative of judicial integrity. It was of this that Mr. Justice Holmes and Mr. Justice Brandeis so eloquently spoke in Olmstead v. United States, 277 U.S. 438, at 469, 471, more than 30 years ago. 'For those who agree with me,' said Mr. Justice Holmes, 'no distinction can be taken between the Government as prosecutor and the Government as judge.' 277 U.S., at 470. [Dissenting opinion.] 'In a government of laws,' said Mr. Justice Brandeis, 'existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the

> conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.' 277 U.S., at 485. [Dissenting opinion.]"

Elkins v. United States, supra, at page 222-223.

Furthermore, it is highly questionable as to whether or not the evidence would have been admissible in Federal prosecutions even before the "silver platter" doctrine had been abrogated by the Elkins decision.

Contact with Mexican authorities, albeit Federal and not Municipal, concerning petitioner had been initiated prior to his arrest (R. T., pp. 27, 28, 208-209). Additionally, since possession or transportation of amphetamine was not a violation of Mexican law at the time (R. T., p. 34), it is difficult to conceive of why Secret Agent Farfan and his brother officers were working almost around the clock investigating and interrogating petitioner unless it was to assist United States authorities. Compare: Birdsell v. United States, 346 F.2d 775 (5th Cir. 1965), cert. denied 382 U.S. 963 (1965), which presented a fact situation with which Mexican authorities would legitimately be concerned, to-wit, possession of a stolen motor vehicle. Furthermore, the opinion of the Fifth Circuit specifically noted, at page 782, that the conduct of the Mexican officials, in all probability, conformed to the requirements of the Fourth Amendment.

In connection with testimony concerning Farfan's interrogation of petitioner some 24 hours after his arrest,

this testimony simply should not have been admitted. The conversation took place after petitioner had been forced to leave the streets of Tijuana and go to the police station where he was interrogated for 12 to 13 hours, then taken to a private home but returned to the commandant's office where he was still present when Farfan conducted his interrogation. Even when the U.S. officers first talked to petitioner at the commandant's office there was a Mexican officer present. In any event, taken as a whole, it is submitted that these practices are among those which have been disapproved by this Court. See: Rogers v. Richmond, 365 U.S. 534, 540 (1961), Haynes v. Washington, 373 U.S. 503, 514-515 (1963).

In addition, since U. S. authorities had initiated contact with the Mexican government concerning petitioner before his arrest; that there was no Mexican law being violated by petitioner, and U. S. officers were in fact called to the commandant's office, then it is highly questionable whether the U. S. Federal officers could isolate themselves from petitioner's detention. See: Gambino v. United States, 375 U.S. 310, at page 316-317, and United States v. Tupper, 168 F.Supp. 907 (WDWY, 1959).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER J. HUGHES,

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HENRY BRULAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 21,198

[August 9, 1967]

Appeal from the United States District Court
for the Southern District of California,
Central Division

Before: BARNES and JERTBERG, Circuit Judges, and SMITH,* District Judge.

SMITH, District Judge:

Henry Brulay was convicted of conspiring to smuggle amphetamine tablets into the United States. 18 U.S.C. §§ 371, 545. The evidence, if admissible, was sufficient to warrant a jury in finding that the defendant received quantities of amphetamine tablets at a Mexican airport and transported them to a building in Tijuana, Mexico, over which he had control. By means of telephone calls meetings were arranged between the defendant and David Fierro in Tijuana, at which meetings the tablets were delivered by the defendant to Fierro for transportation to the United States. This was done pursuant to an agreement with Fierro who had agreed to pay the defendant twenty dollars for each load that he received.

A reversal is urged for six reasons.

*Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

It is urged that the fruits of an illegal search and seizure were admitted in evidence.

Two Mexican police officers noticing that the car which the defendant was driving looked heavy in the rear, stopped him and asked him what he had in the car. The defendant appeared to the officers to be nervous so without a warrant they arrested him and took him into the police station. There defendant, at the request of the officers, opened the trunk of the car where two hundred ninety-seven pounds of amphetamine tablets were found. Questioning at the police station revealed that the defendant had additional tablets stored. The defendant took the officers to a house in Tijuana where nineteen hundred eighty pounds of amphetamine tablets were found. No United States officers participated in the questioning at or prior to the time of the seizure, and although the customs agents of the United States had alerted Mexican federal police to the defendant's activities, the Tijuana municipal policemen who made the seizure were not acting at the instigation of United States customs or narcotic officials. A motion to suppress was denied, and evidence of the seized amphetamine tablets was admitted. It was properly admitted.

The Fourth Amendment is directed at the Federal Government and its agencies.[1] Fourth Amendment rights are protected from state encroachments by the Fourteenth Amendment which reaches the states and their agencies.[2] The Fourth Amendment does not, by its language, require the exclusion of evidence and the exclusionary rule announced in Weeks is a court-created prophylaxis designed to deter federal officers from violating the Fourth Amendment. Neither the Fourth nor the Fourteenth Amendments are directed at Mexican officials and no prophylactic purpose is served by applying an exclusionary rule here since what we do will not alter the search policies of the sovereign Nation of Mexico.

For these reasons we hold that there was no error in admission of evidence of the seized amphetamine tablets. Birdsell v. U. S., 346 F. 2d 775 (5 Cir. 1965), cert. den. 382 U. S. 963 (1965); Wentz v. U. S., 244 F. 2d 172 (9 Cir. 1957), cert. den. 355 U. S. 806 (1957).

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[1]Weeks v. U. S., 232 U. S. 383 (1914).

[2]Mapp v. Ohio, 367 U. S. 643 (1961).

It is urged that statements made by the defendant were improperly admitted.

Several statements were made by the defendant to officers of Mexico and the United States. These statements were admitted in evidence, and if not necessary to the conviction they played a vital part in it.

The first statement was made in Mexico to Mexican officials. We note first of all, assuming arguendo that the defendant had Sixth Amendment rights when questioned in Mexico by Mexicans, that he did not request an attorney and bring himself within the shelter of Escobedo v. Illinois, 378 U. S. 478 (1964). The trial preceded June 13, 1966, the effective date of Miranda.[3] It does not appear that the defendant was brought before a magistrate, and, probably, if what happened had happened within the United States the doctrine of McNabb v. U. S., 318 U. S. 332 (1942) would have been applicable. It does not appear, however, that defendant was held in violation of any Mexican law, and if he was, we believe that the McNabb doctrine would be inapplicable. In McNabb and Upshaw[4] the court was concerned with the violations of federal law by federal officers, and in the exercise of its supervisory power over inferior federal courts, it refused to condone such violations by permitting the use of the fruits of them. We regard the rule of exclusion of McNabb in the same light as the rule of exclusion in Weeks—a rule designed to require that officers of the United States obey its laws. The reason underlying the McNabb rule is not here applicable, and the rule should not be applied.

We then turn to the problem: Were the statements voluntary within Fifth Amendment standards which we believe to be applicable?[5] The defendant did not testify. From the evidence

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[3]Johnson v. New Jersey, 384 U. S. 719 (1966).

[4]Upshaw v. U. S., 335 U. S. 410 (1948).

[5]In Bram v. U. S., 168 U. S. 532 (1897) statements were taken by Canadian officers in Halifax, and the court, without considering the problem of its extraterritorial effect, applied Fifth Amendment standards in rejecting the statements made. We recognize the difference between our treatment of the Fourth and Fifth Amendments in this opinion. As an explanation we suggest that the law is violated in Fourth Amendment cases when the illegal search takes place. At that moment the violation

given by the officers it appears that the defendant was intermittently questioned at the police station from about 9:00 A. M. to 11:00 P. M. on the 28th of January, 1966. It was during the course of this questioning that he opened the trunk of his car and took the officers to the house. As previously indicated, amphetamine tablets were found in both places. The record is silent as to the number of rest periods permitted to the defendant and as to the food or toilet facilities furnished to him. There is no evidence of any physical or psychological coercion, except what might be inferred from the total elapsed time between the commencement and termination of the interrogation. Customs Agent Moore, who saw defendant on January 30, testified that defendant bore no visible bruises, did not appear to be sleepy and made no complaints about his treatment by the Mexican officials. Defendant did tell the United States arresting officer that he had cooperated fully with the Mexican police. The trial court specifically found that the statements were not coerced, and then, by more than adequate instructions, told the jury that unless it is found that the confessions were voluntary it should disregard them.[6]

While appellate judges have not been reluctant to go behind the findings of trial judges and juries in confession matters, the rule that the determination of the voluntariness of a confession, where there are conflicting facts or conflicting inferences, is primarily one for the trial court[7] has not yet been abandoned. We believe that the trial judge and the jury, on the record here,

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of the Constitution is complete. The fruits of the illegal search are rejected not because the Constitution expressly requires it, but because it is inappropriate to sanction the previous violations of law by federal officers. That policy cannot be exported. In Fifth Amendment cases the problem is different: At the time a confession is taken laws may or may not be violated. Certainly there are many cases where confessions which do not meet Fifth Amendment standards are taken without any violation of law. It is not until the statement is received in evidence that the violation of the Fifth Amendment becomes complete. For this reason we believe that if the statement is not voluntarily given, whether given to a United States or foreign officer,—the defendant has been compelled to be a witness against himself when the statement is admitted.

[6]Jackson v. Denno, 378 U. S. 368 (1964).

[7]Lyons v. Oklahoma, 322 U. S. 596 (1944).

were warranted in finding as they did, and certainly there was no clear abuse of discretion.

The second interrogation occurred on January 30th in the police headquarters in Tijuana and was conducted by a customs agent of the United States who, prior to the interrogation, fully advised the defendant of his rights. There is not the slightest evidence of any coercion at the time of this interrogation. Since we have rejected the claim of coercion as to the first interview, we reject the argument that the second was a continuation of or a product of a tainted first interview.

It is urged that there was no proof of any act within the United States.

Defendant asserts that there is no proof that the conspiracy was formed in the United States, or that he committed any overt act within the United States, and that regardless of what happened in Mexico no crime was committed for which he may be tried. The defendant was a citizen of the United States and may be punished here for the crime charged although it was committed in Mexico. The rule is enunciated in Bowman v. United States, 260 U. S. 94 (1922) as follows:

> "But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud, wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense." Supra, at 98.

Since smuggling by its very nature involves foreign countries, and since the accomplishment of the crime always requires some action in a foreign country, we have no difficulty inferring that Congress did intend that the provisions of 18 U.S.C. § 545 should extend to foreign countries at least as to citizens of the United States, and that 18 U.S.C. § 371, the conspiracy section, is extended along with it.

It is urged that there was a fatal variance.

After alleging the conspiracy charged, the indictment states, ". . . committed divers overt acts, among which are the following:

"1. On or about January 7, 1966, defendant HENRY BRULAY left his residence in a Chrysler automobile.

"2. On or about January 26, 1966, defendant HENRY BRULAY caused the transportation of approximately 1,958 pounds of Amphetamine tablets from the garage of Henry Brulay, Jr., also known as Henry Anthony Brulay, to another location; . . ."

The court submitted special interrogatories to the jury. The jury answered one of the interrogatories but did not answer the other two. From these answers we know that the jury which had been so instructed, convicted the defendant by finding that he committed an overt act which was not specifically charged in the indictment. Squarely presented is the problem: May a conspiracy conviction rest upon the proof of an overt act not charged in the indictment? If the case of Fredericks v. United States, 292 Fed. 856 (9 Cir. 1923) states today's law in this Circuit, the answer is 'no'; otherwise it is 'yes'.

The statutory law governing the court at the time of Fredericks was § 269 of the Judicial Code, 28 U.S.C. § 391, 40 Stat. 1181, reading:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The law governing the court today is 28 U. S. C. § 2111, reading:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

and Rule 52(a) of the Rules of Criminal Procedure, reading:

> "Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

The word difference between the law of 1919 and the laws of today is not great, but it is to be noted that the phrase "technical errors" has been deleted from the present law and the word "errors" substituted. It may be also noted that Rule 52(a) contains an express reference to "variance" which did not appear in the 1919 Act. To us these changes indicate a Congressional intention to emphasize the concept that any error not causing detriment should be disregarded and to make it clear that variances are to be treated no differently from other defects. While the Fredericks case did not mention § 269 of the Judicial Code, we must take it to be an application of the then existing statutory law. As such it does not bind us today because we apply different statutes and rules.[8]

Obeying the mandates of Rule 52(a) we inquire: Was any substantial right of the defendant affected? The overt act on which the guilty verdict was based was: "Defendant Henry Brulay on or about January 28, 1966, drove an automobile in the City of Tijuana, Mexico, in the trunk of which were contained amphetamine tablets." The record leaves no doubt of the truth of this. The record indicates that all of the persons who had knowledge of the tablets in the trunk of the car, and who saw the defendant driving it, were presented as witnesses and were examined. It is not suggested in the argument here nor was it suggested to the trial court, that there was any evidence other than that which was produced which could have shed any

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[8]Cf. United States v. Negro, 164 F. 2d 168 (2 Cir. 1947). See also Note, 72 Harv. Law Rev. 920, 993 (1959).

light upon the overt act found. The fact of the tablets in the trunk was so central to the case that it is impossible to believe that the defendant and his lawyers did not know that the government would prove the overt act found. In short, nothing happened here that would not have happened had the indictment contained a statement of the overt act found. Additionally it may be observed that there was no motion for a bill of particulars, that there was no objection (except on fourth amendment grounds) when evidence of the overt act found was admitted, and that at no time did the defendant claim surprise. There was a variance but it did not affect the defendant's rights, let alone his substantial rights, and within the letter and spirit of Rule 52(a) and 18 U. S. C. § 2111, we find no reversible error.

It is urged that the conviction rests upon defendant's uncorroborated statements. It would serve no useful purpose to recite the evidence in this opinion. We have examined the record and believe that the defendant's statements were sufficiently corroborated within the rule enunciated in Opper v. United States, 348 U. S. 84 (1954).

Evidence that one Rodriguez was dealing in amphetamine tablets in the United States was admitted. These tablets were made by the same press as those found in the defendant's possession and were of a kind not manufactured in the United States. It is urged that the admission of this evidence was error. There was evidence of numerous telephone calls between a telephone listed to Rodriguez in Los Angeles and one which had been listed by the defendant under an assumed name at San Ysidro, California, which is about one-half mile from the Mexican border. This evidence, while not conclusive, was relevant as tending to prove defendant's connection with the importation of the tablets into the United States and it was not error to admit it.

Finding no reversible error, the judgment of conviction is affirmed.

APPENDIX B

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX C

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

§ 371. Conspirary to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION

FEBRUARY, 1966, GRAND JURY -
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. HENRY BRULAY, Defendant.	No. 36190 -SD INDICTMENT (U.S.C., Title 18, Section 371 - Conspiracy to smuggle Amphetamine)

The Grand Jury charges:

Beginning at a date unknown to the Grand Jury and continuing until on or about January 30, 1966, defendant HENRY BRULAY, unindicted co-conspirators Henry Brulay, Jr., and David Fierro, and divers other persons to the Grand Jury unknown, agreed, confederated and conspired together to commit an offense against the United States, namely, knowingly and wilfully, and with intent to defraud the United States, to smuggle and clandestinely introduce into the United States from Mexico certain merchandise, namely, Amphetamine tablets, which merchandise should be invoiced, and to fraudulently and knowingly import and bring into the

United States from Mexico said merchandise contrary to law, in that said merchandise had not been presented for inspection, entered and declared as provided by United States Code, Title 19, Sections 1459, 1461, 1484 and 1485, said agreement, confederation, and conspiracy being in violation of Title 18, United States Code, Section 545, and to effect the object of said conspiracy the defendant committed divers overt acts, among which are the following:

1. On or about January 7, 1965, defendant HENRY BRULAY left his residence in a Chrysler automobile.

2. On or about January 26, 1966, defendant HENRY BRULAY caused the transportation of approximately 1,958 pounds of Amphetamine tablets from the garage of Henry Brulay, Jr., also known as Henry Anthony Brulay, to another location;

and defendant HENRY BRULAY was first found, and first brought into the Southern Division of the Southern District of California.

A TRUE BILL

_____

Foreman

MANUEL L. REAL
United States Attorney

_____

Asst. United States Attorney

PWJ/rs

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 596

HENRY BRULAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiring to smuggle amphetamine tablets from Mexico into the United States, in violation of 18 U.S.C. 371 and 545 (1 R. 2–3, 66; see Pet. App. 24–25).[1] He was sentenced to five years' imprisonment, with parole eligibility to be determined by the Board of Parole pursuant to 18 U.S.C. 4208 (a)(2) (1 R. 36). The court of appeals affirmed (Pet. App. 13–20).

[1] Named as unindicted co-conspirators were Henry-Brulay, Jr., David Fierro, and "other persons to the Grand Jury unknown * * *" (1 R. 1; Pet. App. 24).

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Petitioner contends that the fruits of an unreasonable search and seizure carried out by Mexican police in Tijuana, Mexico, were improperly admitted at trial in violation of his Fourth Amendment rights, and that statements he made to Mexican and United States authorities around the time of his arrest in Mexico were admitted into evidence in violation of his Fifth Amendment privilege against self-incrimination.

1. The pertinent evidence relating to these contentions, adduced at the hearing on petitioner's motion to suppress the amphetamine tablets, and at the trial, show that at about 8:30 or 9:00 a.m. on January 28, 1966, two officers of the Tijuana, Mexico, Police Department stopped an automobile being driven by petitioner because it had been going "quite fast" and appeared to be heavily loaded in the rear (2 R. 11–13, 17, 36–37, 51–54, 56–57, 58). These officers were assigned to investigate auto thefts and were authorized under Mexican law to stop anyone who looked suspicious (2 R. 14, 17, 58–59). When asked by the officers what he had in the trunk, petitioner, who appeared to be "quite nervous", replied that it contained some packages. The officers became suspicious and took petitioner and the automobile to local police headquarters to determine the contents of the trunk (2 R. 17, 37, 51–59). The officers were not acting on any information previously provided by United States authorities (2 R. 14–17, 59).[2]

[2] Petitioner had, in fact, been under investigation for smuggling by United States Customs authorities since December 21, 1965. On January 24, 1966, the federal Mexican police authorities (not the Tijuana police) were advised of certain information that such investigation had turned up (2 R. 26–28).

Shortly after their arrival at the Tijuana police station (between 9 to 9:30 a.m.) (2 R. 2, 3, 61), at the direction of the local authorities, petitioner opened the car trunk, where some 297 pounds of boxed amphetamine tablets were found (2 R. 13–14, 15, 21–22, 37–38). Apparently that same day (but compare 2 R. 22–23 with 2 R. 39–40), petitioner was taken to a room at police headquarters and questioned about these tablets (2 R. 24). He was questioned on various occasions during the remainder of the day (2 R. 61–64, 71–76). The room in which the questioning took place was "sort of a living room. It has a long sofa and a small sofa and a writing desk" (2 R. 75). Some time during the day, petitioner advised the officers that he was "involved in that business of the tablets" (2 R. 40), and that since there had been no shipment for the previous four weeks he had come to Mexico to discuss the matter with one of his associates (2 R. 23, 40–42, 76).[3] At about 10 or 11 p.m. that same night, petitioner took the Tijuana police to a house in that city, obtained a key to a room therein from an occupant of the premises and entered with the officers. In the room there were an additional 1,980 pounds of tablets worth "at least some 200 thousand dollars" in the American market (2 R. 22, 41–44, 62, 75–76). Petitioner was then returned to the interrogation room, where he presumably remained overnight.

In the mid-morning of either January 29 or January 30 (see 2 R. 47–50, 103–104), United States Cus-

[3] It is not a crime in Mexico to possess or transfer amphetamine tablets (2 R. 34).

toms agent Moore arrived in Tijuana and interviewed petitioner in a "good-sized room" at the Tijuana jail (2 R. 112, 114). Before the interview, the agent identified himself as a United States Customs officer and advised petitioner that he was not required to make any statement; that any statement he might make could be used against him; and that he was entitled to be represented by counsel (2 R. 102–104, 107–108). Petitioner made certain incriminating admissions to the agent (2 R. 108). Agent Moore had a second interview with petitioner at the Tijuana jail on February 2, 1966; the agent also began this interview with a warning such as he had earlier given to petitioner (2 R. 108–109).[4] At this time, petitioner indicated that he had previously cooperated with the Tijuana police (2 R. 110–111). At a February 3 interview with another Customs agent (at which petitioner was also warned of his rights), he again stated that he had "cooperated" fully with the Mexican police (see 2 R. 96–99, 101). Petitioner did not offer any testimony or request a hearing on the voluntariness of his admissions outside the presence of the jury.

The trial court denied the motion to suppress the seized amphetamine tablets, noting that "[n]o federal law applies in Mexico" (2 R. 30; see *id.* at 29–31). As to the admissions, the trial court pointed out, *inter alia,* that defense counsel did not "elect to ask to hold any hearing out of the presence of the jury,

[4] Agent Moore interviewed petitioner a third time on February 5, 1966, while he was in jail in San Diego. Petitioner was again warned of his rights (2 R. 102–103), and made some additional incriminating admissions (2 R. 106–107).

outside of some Bench conferences. No requests of any sort were made except that he made objections at the Bench" (2 R. 204). The trial court, in accord with the principles of *Jackson* v. *Denno*, 378 U.S. 368, thereupon made specific findings that the admissions made by petitioner to the Mexican and American authorities were free and voluntary (2 R. 204–205). He thereafter instructed the jury that it had to disregard "entirely" any confessions if "the evidence does not convince beyond all reasonable doubt" that they were made voluntarily (3 R. 304–306; see also the court's earlier admonition in this regard during trial (2 R. 105–106)).

2. Both courts below correctly held that the admissibility of the amphetamine tablets seized in Mexico by Mexican authorities was not to be tested under Fourth Amendment requirements. There is nothing in this record to suggest that the Tijuana police were acting at the behest or instigation of American authorities. On the contrary, the testimony shows that, at the time of the seizures, the Tijuana authorities had no knowledge that petitioner was under investigation by United States Customs officials. This then was a search conducted in a foreign land under the control and direction of foreign law-enforcement officials who were not bound by Fourth Amendment requirements. The purpose of the constitutional rule of exclusion—to effectuate the constitutional right "by removing the incentive to disregard it"[5]—is not served by the exclusion of evidence seized outside the United States

[5] *Elkins* v. *United States*, 364 U.S. 206, 217; *Mapp* v. *Ohio*, 367 U.S. 643, 656, 657.

by foreign law-enforcement officials. *Birdsell* v. *United States*, 346 F. 2d 775 (C.A. 5), certiorari denied, 382 U.S. 963; cf. *Burdeau* v. *McDowell*, 256 U.S. 465; see Pet. App. 14.

3. We agree with the court of appeals (Pet. App. 15–16) that the admissibility of petitioner's admissions cannot be justified by reliance on a similar line of analysis. Illegally obtained confessions are not excluded merely as a salutary measure to deter illegal law enforcement. They are excluded because of a "complex of values", including both the likelihood that if involuntary they are untrustworthy and the general distaste for a man's convicting himself out of his own mouth—the result if involuntary confessions are used as an aid in establishing guilt. See, *e.g.*, *Blackburn* v. *Alabama*, 361 U.S. 199, 206–207; *Jackson* v. *Denno*, 378 U.S. 368, 385–386. Accordingly, basic concepts of voluntariness and fairness, in our view, govern the admissibility of the admissions made by petitioner to the Mexican as well as to American authorities. Compare *Bram* v. *United States*, 168 U.S. 532.

These standards, we submit, were satisfied as to each of the confessions here in issue. Both courts below could—as they did—conclude that the admissions obtained by the Mexican authorities were not the product of physical or mental coercion; that, on the contrary, petitioner of his own free will had cooperated fully with the Mexican authorities and made voluntary and uncoerced concessions of guilt to them. On the instant record, there is no basis for an argument that petitioner's confessions to the Mexican and American

agents were the product of the duration or nature of his detention. The questioning by the Mexican police was not continuous, but was conducted intermittently by one police officer (See R. 61–63, 75–76). Nor was the room in which petitioner was kept during this time barren or uncomfortable. There is, in short, no indication in this case of the inherently coercive process of extensive relay questioning which could be deemed to have vitiated the voluntariness of petitioner's admissions. See, *e.g., Reck* v. *Pate,* 367 U.S. 433, 435–443; *Haynes* v. *Washington,* 373 U.S. 503, 513–515. Petitioner's questioning by American authorities was of course preceded, on each occasion, by a warning as to his rights (see *supra,* p. 4). In any event, petitioner never requested a hearing outside of the presence of the jury to testify or to present any evidence concerning the circumstances surrounding his interrogation. Accordingly, such gaps in the record as may exist regarding the specific details and the exact length of petitioner's detention and questioning should not be regarded as sufficient to undermine the holdings below on the voluntariness issue. Compare *Jones* v. *United States,* 357 U.S. 493, 499–500.[6]

[6] Since petitioner's trial commenced on March 22, 1966, the particularized warning requirements of *Miranda* v. *Arizona*, 384 U.S. 436, decided on June 13, 1966, have no application here. *Johnson* v. *New Jersey*, 384 U.S. 719. Nor is the rule of *Escobedo* v. *Illinois*, 378 U.S. 478, pertinent in this case, since petitioner never requested and, accordingly, was not denied, any right to confer with counsel. See *Johnson* v. *New Jersey*, 384 U.S. at 734. There is thus no need to consider whether these requirements would apply to questioning by the Mexican police (see Pet. App. 15).

The district court, the jury and the court of appeals found the confessions to have been made voluntarily. In the instant circumstances, then, there is no further occasion for review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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